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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1069

LAY FACULTY ASSOCIATION, LOCAL 1261,

Petitioner,

v.

BISHOP FORD CENTRAL CATHOLIC HIGH SCHOOL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Question Presented

Whether a private, pervasively religious, secondary school governed by lay men and women is exempt from the application of the National Labor Relations Act to its lay teachers.

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Statement

On May 15, 1978 the National Labor Relations Board (the "Board") issued its decision and order in 236 NLRB 1 finding that Respondent Bishop Ford Central Catholic High School ("Ford Central") had violated Section 8(a)(1)(3) and (5) of the National Labor Relations Act (the "Act"), 29 U.S.C. 158(a)(1)(3) and (5), by, among other things, refusing to recognize and bargain with Petitioner Lay Faculty Association (the "Union") as the representative of its lay faculty. On April 27, 1979, the Court of Appeals remanded the case to the Board for reconsideration in light of this Court's decision in *NLRB* v. *The Catholic Bishop of Chicago,* 440 U.S. 490 (1979). On June

25, 1979, the Board, Member Penello dissenting, issued a Supplemental Decision in 243 NLRB No. 24, affirming its original decision as to Ford Central. Ford Central resisted enforcement on three grounds, *viz.*, (1) it is a church-operated school within the meaning of *Catholic Bishop* and thus the Board did not possess statutory power to issue a bargaining order, (2) the assertion of jurisdiction violated the Establishment and Free Exercise Clauses of the First Amendment, (3) the exclusion of religious faculty from the bargaining unit was arbitrary and capricious. On June 17, 1980 the Court of Appeals denied enforcement based only upon its finding that Ford Central is a church-operated school.

The Union, Intervenor below, seeks review of this decision.

Reasons for Denying the Writ

The Union's petition for certiorari does not and cannot claim that there is any conflict between the circuits, and we believe that there are no other reasons warranting exercise of this Court's review power. This Court has held that "the church-teacher relationship in a church-operated school differs from the employment relationship in a public or other nonreligious school." *NLRB* v. *Catholic Bishop of Chicago,* 440 U.S. 490, 504 (1979). Noting that Ford Central is obviously not a public or nonreligious school, the Second Circuit concluded that this Court employed the term "church-operated" not in the restricted sense now advanced by the Union, "but rather as a convenient method of characterizing schools with a religious mission" 623 F.2d 818, 823 (1980). The Union's petition claims that "the Court of Appeals erroneously and unnecessarily expanded the exemption from Board jurisdiction created by

this Court in *Catholic Bishop.*" Cert. Pet. at p. 22. We submit that the Court of Appeals did no such thing. The decision below correctly focused upon the religious nature and activity of the school, just as this Court did in *Catholic Bishop.* The ownership and managerial control of the school is not a factor in determining eligibility for the exemption.

I.

The Religious Nature of the School

In *Catholic Bishop* this Court considered the question whether Congress intended the Act to cover church-teacher labor relations in private, religious primary and secondary schools. Finding that the Board's exercise of jurisdiction over the schools would give rise to serious constitutional questions, the Court examined the legislative history and concluded that there was no affirmative intention of Congress that teachers in church-operated schools should be covered by the Act. Serious constitutional questions were perceived because of the Court's experience with cases involving aid to parochial schools. In *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971), the Court struck down public aid to parochial schools in Pennsylvania and Rhode Island because state officials could not effectively monitor the performance of religious teachers without becoming excessively entangled in the religious affairs of the schools. In *Meek* v. *Pittenger,* 421 U.S. 349 (1975), the Court invalidated a Pennsylvania state statute authorizing the use of public school instructional staff, supportive materials, equipment and personnel for nonpublic schools. The basis of the Court's decision was that excessive entanglement would have been required for Pennsylvania to be assured

that the public school teachers would not advance religion in the schools in which they served.

Thus, the danger of secular entanglement in religious doctrine has been the major predicate for denial of public aid to religious schools. In *Catholic Bishop* the Court decided that entanglement could result as well from government regulation of church-teacher labor relations. It rejected the Board's argument that it could avoid such entanglements by limiting its involvement to factual issues. "We see no escape from conflicts flowing from the Board's exercise of jurisdiction over teachers in church-operated schools and the consequent serious First Amendment questions that would follow." 440 U.S. at 504. In its petition the Union argues that Ford Central is not a church-operated school and that no significant risk of entanglement exists. The simple answer to this may be found in *Catholic Bishop* where the Court, quoting from *Lemon, supra,* 403 U.S. at 616 stated:

> ". . . parochial schools involve substantial religious activity and purpose.
>
> "The substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid." 440 U.S. at 503.

It is more than apparent that the Court has fastened on the religious activity of the schools as the principal harbinger of entanglement with government. Ownership or managerial control of the schools by religious authorities has never been regarded as especially significant. Since it is not disputed that Ford Central is a pervasively religious school and that its lay teachers play a critical part in its

religious mission there is no warrant for consideration of the decision below by the Court. Indeed, if the Court were to decide that Ford Central is not a church-operated school, we surmise that it would still be essential under the *Catholic Bishop* analysis to determine whether assertion of jurisdiction by the Board would give rise to constitutional questions.

Apart from the serious constitutional questions contemplated by the Court in *Catholic Bishop,* the strictly literal meaning which the Union attaches to the phrase "church-operated" would, if adopted, present a threshold constitutional question. As the Second Circuit pointed out below:

> "We have searched in vain for any case involving public aid where the Court distinguished between Catholic, or other denominational, primary or secondary schools owned and operated by diocesan authority and those owned and operated by religious or lay groups." 623 F.2d at 823.

Ford Central would go further. We know of no case which upholds the denial of a government exemption or benefit to a conceded religious organization based upon a lack of ownership or managerial control by a traditional hierarchical church. To do so would favor clerically oriented religious bodies over lay groups even though both carry out the same religious functions. This smacks of an established church. The federal courts have been very careful to avoid interpreting religious exemptions in such a way as to favor orthodox sects. *United States* v. *Seeger,* 380 U.S. 163, 185 (1965); *Welsh* v. *United States,* 398 U.S. 333 (1970); *Washington Ethical Society* v. *District of Columbia,* 249 F.2d 127, 129 (D.C. Cir. 1957). Significantly, the Union has offered no explanation in its petition *why* the

exemption should be limited to clerical trustees when lay trustees discharge the very same religious duties. We submit that there is no reasonable explanation.

II.

The Control by the Diocese Over Ford Central's Religious Activities

Although the Court of Appeals denied enforcement of the Board's order on the basis of the religious mission of Ford Central, it also found that the Diocese maintained a significant degree of control of the school. The transfer of the real property from the Diocese to Ford Central was contingent upon the latter operating a Roman Catholic high school on the premises. The property reverts to the Diocese when and if this condition ceases to be met. Thus the Bishop has a continuing supervisory role in the religious affairs of the school. Under these circumstances, the Union's assertion that Ford Central is totally independent of the Diocese is inaccurate. Any conflict between Ford Central and the Union over working conditions which touches on a religious matter would inevitably implicate the religious authority of the Diocese.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Union's petition for a writ of certiorari should be denied.

Respectfuly submitted,

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